While one can appreciate the dilemma in which the learned trial Judge found himself as the result of his findings he has, with the greatest respect, in my opinion, decided the case on issues not raised by the pleadings and against the admissions contained in them and the evidence.

The case, in my view, must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment.

For these reasons alone, in my judgment, this decision cannot be allowed to stand and in the circumstances of this case I have come to the conclusion that in order to do justice between the parties a new trial must be ordered.

As there is to be a new trial the less I say about the evidence the better. Whether or not the learned trial Judge's findings were justified by the evidence is a matter on which I think, I should refrain from expressing any opinion. Although the evidence is not as clear as it might be it is, in my opinion, difficult to escape the conclusion that the alleged sale by the defendant to the plaintiff on June 17, 1960, and the hire purchase agreement between the plaintiff and Lim Boon Hin were all part and parcel of the same transaction.

In view of the course we propose to take the parties will no doubt take the opportunity, if they be so advised, of amending their pleadings so that all the relevant and material issues will be raised and recorded therein.

In my opinion the appeal must be allowed and the judgment of the learned trial Judge set aside. There must be a new trial before another Judge. The appellant must have his costs of this appeal but there will be no order as to costs in the Court below.

Appeal allowed. New trial ordered.

Solicitors: *Hilborne & Chung; A. J. Braga.*

KHOO CHOOI SIM v. THE RADIO & GENERAL TRADING CO. LTD.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Tan Ah Tah J.) December 5, 1963]

[Ipoh — Federal Court Civil Appeal No. 36 of 1963]

Hire-purchase agreement—Default by hirer—New agreements made between hirer and company—Whether new agreements bills of sale.

Bill of Sale—Modification of hire-purchase agreement—Default by hirer on modified agreement—Plea by hirer that modified agreement was a bill of sale—Whether property in goods had passed to hirer under modified agreement—Bill of Sale Ordinance, 1950.

In 1960 the appellant entered into hire-purchase agreements with the respondent company under which certain electrical goods and equipment were taken by her. Clause 6 of the agreements stated that the property in the goods would remain with the respondent company but would pass to the appellant when she had paid all the instalments under the agreements. The appellant subsequently defaulted on these agreements and by mutual consent revised agreements were drawn up and signed by the parties in 1962. The respondent company maintained that the new agreements were in effect continuations of the 1960 agreements. The appellant argued that the 1962 agreements were nothing but cloaks to cover licences to seize the goods the property in which had already passed to her and that therefore the documents were bills of sale under the Bill of Sale Ordinance and were void because they were not registered.

Held: there was nothing in the documents or surrounding circumstances to say that the property in the goods had passed to the appellant under the 1960 agreements and the 1962 agreements were not bills of sale because at the time of the agreements property was vested in the respondents.

The decision of the learned trial Judge affirmed and the appeal dismissed.

Cases referred to:—

(1) *Beckett* v. *Tower Assets Co. Ltd.*, [1891] 1 Q.B. 1.

(2) *In re Watson* (1890) 25 Q.B.D. 27.

(3) *McEntire* v. *Crossley Brothers*, [1895] A.C. 457.

(4) *Helby* v. *Matthews*, [1895] A.C. 471.

(5) *Polsky* v. *S. & A. Services Ltd.*, [1951] 1 All E.R. 1062.

In the Court below the following judgment was delivered:

Ali J.: The plaintiff company in this action seeks to recover arrears of rents due under 8 hire purchase agreements entered into with the defendant on July 19, 1962, and also for an order of possession of the goods supplied. All the terms of the agreements were identical in each case and were related to the hiring of certain electrical goods and equipment specified in the schedules thereto. Each agreement was headed "Hire Purchase Agreement" and the opening sentence thereof began with an offer by the hirer to hire the goods specified in the schedule on the terms and conditions stated upon the acceptance of the offer and delivery of the goods by the plaintiff company within 21 days from the date of the offer. In view of the defence raised in this action, it is necessary to refer to some of the clauses in the agreement which would directly or indirectly have some bearing on the issue. Clause 1 provided for:—

(a) The initial payment by the hirer in consideration for the option to purchase and this payment was referred to in the schedule as deposit, and

(b) The amount of monthly rents or instalments payable, the particulars of which were specified in the schedule.

Clause 2, amongst other things, contained an undertaking by the hirer to pay the rent punctually, and clause 3 was in respect of an undertaking to use the goods skilfully and in a proper manner and not to remove, assign, let on hire or part with the goods without the written consent

of the company. The hirer also undertook to maintain the goods in a good state of repair and to take out insurance against loss or damage by fire. Clause 4 provides that in the event of a default of payment of monthly instalments within 7 days or of failure to observe the terms and conditions of the agreement, the company would have authority to enter the hirer's premises and the right to re-take possession of the goods "without prejudice to the company's rights to claim or sue for payment of all rental due or for the payment by way of compensation for depreciation in the goods of a sum equal to one-half of the agreed purchase price whichever is the greater". There was also an undertaking by the hirer to pay to the owner the cost or expenses incurred in re-taking possession of the goods. Clause 6, which is an important clause in view of the defence, provides that the property in the goods shall remain with the company but will become the property of the hirer:—

(a) Upon payment to the company, at any time during the hiring, of such a sum as together with such paid under Clause 1 would amount to the agreed hire purchase price stated in the schedule, or

(b) If and when the total amount paid under Clause 1 amounted to the agreed hire purchase price stated in the schedule.

The period covered by each agreement reckoned by the number of instalments payable was for two years. *Prima facie,* each agreement is a contract for hire of goods with an option to purchase granted to the hirer and under which the company retains the right to resume possession in the event of a default in the payment of rents.

The circumstances leading to the agreements, which are not apparent from the plaintiff's pleadings, were that some time in 1960 the defendant, who was managing a hotel business in Ipoh, required certain electrical goods and equipment to be supplied and installed in the hotel premises known as the Olympic Inn. As she was unable to pay for these in one lump sum the plaintiff company, who was, and is, a dealer in these goods agreed to supply them on hire purchase terms. As the goods were ordered for and supplied on various dates in 1960 a group of hire purchase agreements, numbering 8 in all, were signed by the defendant. Each of the agreements, which was for a period of two years, contained terms exactly similar to those contained in the agreements signed in 1962. The defendant fell into arrears with her monthly instalments under all the 8 agreements which, at the end of the two year period, amounted to $26,422.42, including interest. The defendant did not dispute this amount nor did she challenge the correctness of the accounts which were produced in evidence. The plaintiff company did not, however, exercise its right to resume possession of the goods under the agreements but instead entered into a new arrangement with which the defendant agreed. This new arrangement entailed the signing by the defendant on July 19, 1962, of 8 new hire purchase agreements, the terms of which have been set out earlier. Under this new arrangement it was agreed that the original hire purchase price of the goods plus the interest charged under the 1960 agreements would be shown in the corresponding agreements of 1962 as the new hire purchase price plus further interest. At the same time, in each agreement, all payments already made by the defendant in respect of the 1960 agreements were brought into account and the total payment made shown in the new agreement as initial payment or deposit. The difference between the new hire purchase price plus interest and the initial payments represents the balance of the purchase price to be paid by the defendant in smaller monthly instalments over a period of two years. According to the plaintiff company the new arrangement was in effect a continuation of the 1960 arrangement except that the defendant was charged additional interest in consideration of the extension of time allowed and the reduction in the amount of the instalments to be paid. That the defendant had agreed to this new arrangement there could be no question. It might well be that the original hire purchase price had been considerably enhanced by the additional interest charged and that the plaintiff company was thereby making an enormous amount of profit. But this, I think, is hardly a matter for the Court. However, the new arrangement continued for some time until the defendant again fell into arrears with the payment of the instalments. After some correspondence between the parties on the question of payment, the defendant offered to pay $500 a month. But finally, when it became clear to the plaintiff company that the defendant was not able to keep up with her payments, this action was commenced.

The statement of defence starts off with the denial that the plaintiff company is the owner of the goods. In paragraph 2 the defendant, although admitting having signed the 1962 agreements, denies that they have accurately set out the terms of the transaction as stated in the plaintiff's pleadings. Then in paragraph 3 the defendant referred to the earlier agreements signed in 1960. In paragraph 4 the defendant contends that she is entitled to avoid the 1962 agreements on the ground that they were cloaks to cover licences to seize goods the property in which had passed to the defendant and are, therefore, bills of sale which are void for want of registration under the Bills of Sale Ordinance, 1950. Although in paragraph 8 the defendant raised the alternative defence that the agreements were or formed part of a moneylending transaction effected in the course of the plaintiff's business as an unlicensed moneylender, this was

abandoned at the trial. Paragraph 5 of the statement of defence states that the relationship between the parties is that of seller and buyer and not that of owner and hirer. What the defendant is in effect saying is that in 1962 when she signed the property in the goods had passed to her. I also understood her to be saying in effect that the true transaction to which the agreements relate was that the goods, which legally belonged to her, were given as security for the payment of a debt to the plaintiff.

Before dealing with the defence, it is necessary to recapitulate the facts showing the nature of the transaction between the parties in so far as these are necessary for a clear understanding of the defence case. In this connection, I need only concern myself with the transaction leading to the signing of the agreements in 1962. It has been proved or admitted that on the expiry of the period allowed under the 1960 agreements the defendant was heavily in arrears of rents. It is not in dispute that the defendant, in order to continue to be in possession of these goods, agreed to enter into a new arrangement whereby additional interest had to be paid and that the new agreements should bring into account all that had been agreed and performed under the 1960 agreements. Above all, the defendant has never at any stage either before or during the trial of the action asserted that the 1962 agreements pertained to other than the transaction described above.

The alternative defence under paragraph 7 of the statement of defence having been abandoned, the only issue for determination is whether the hire purchase agreements are bills of sale creating a licence to seize goods belonging to the defendant. Paragraph 4 of the defence does not, however, set out in full the words used in the definition of the term "bill of sale" in section 3(1) of the Bills of Sale Ordinance, 1950. The words used there are "licences to take possession of personal chattels as security for any debt." In support of her contention the defence referred to the decisions in *Beckett* v. *Tower Assets Ltd.*[1] and *In re Watson,*[2] which, I must say at the outset, were concerned with situations wholly different from the present one. In each of these cases the question as to whether there had been a complete sale by the borrowers of money of his or her own property to the lenders was relevant to the consideration that the transaction covered by the hire purchase agreement was either a real hire purchase transaction involving the sale of the property followed by a repurchase of the same on hiring terms or was one of a loan of money on the security of the property. In *Beckett's* case *supra,* although there was clear evidence that the lender of money had deliberately induced the owner of the property to enter into a transaction to circumvent the Bills of Sale Act, Cave J. sitting with a special jury, nevertheless held that there had been a sale followed by a repurchase and that the agreement entered into by the plaintiff's wife was not within the Bills of Sale Acts. In *In re Watson's* case *supra,* the Court of Appeal, acting on the finding of fact by the County Court Judge, who said that the form adopted to effect the sale of the furniture to the lender of the money was a sham and a fictitious one, held that the agreement came within the Bills of Sale Act being licences to seize goods as security for the payment of a debt. I am clearly of the view that the issues involved in these two cases are distinguishable from the present one. There is here no question of any moneylending transaction from which the relationship of borrower and lender can arise. Nor is it part of the defence case that the goods were given as security for the payment of money lent by the plaintiff to the defendant. As far as I can see the only issue raised by the defence here is that when the parties entered into the new agreement in July, 1962, the intention was that the property in the goods should pass to the defendant who, in turn, gave the plaintiff the right to seize these goods in the event of a failure to pay the balance of the purchase price. This contention is somewhat similar to that raised in *McEntire* v. *Crossley Brothers,*[3] which is a House of Lords decision dismissing an appeal against the judgment of the Court of Appeal. The Court of Appeal had discharged an order made by a single Judge refusing an application by Crossley Brothers for delivery to them of an engine made on the ground that the person to whom the engine was supplied had not paid the full purchase price under an agreement. The person to whom this engine was supplied having been adjudged a bankrupt, the assignee in bankruptcy resisted the application on the ground that the property in the engine had passed to the bankrupt. The agreement by which the engine was let to the bankrupt was in the nature of a lease containing terms which were in effect similar to those contained in each of the agreements signed by the defendant in the present case. It was argued on behalf of the assignee in bankruptcy that the transaction was not of hiring but of sale and mortgage by the purchaser — the bankrupt. The mortgage, being of a chattel, was a bill of sale and not being registered was void under the Bills of Sale Act. The Court of Appeal rejected this argument and ordered that the engine be given up to Crossley Brothers as the true owners thereof. The House of Lords, affirming the decision of the Court of Appeal, held that upon a true construction of the agreement the property in the engine never passed to the lessee but remained in the lessor; that the transaction was, therefore, not within the Bills of Sale Act. At page 462, Lord Herschell L.C. said:—

"But, of course, in order to make out that the assignees have a title to this engine under the Bills of Sale Act, it is absolutely essential to prove that the property in the engine, at some time or other, passed to the bankrupt. If the property never passed to the bankrupt he can never have conveyed it or assigned it or given the right to seize, or have given any of the rights over it within the meaning of the Bills of Sale Act."

Speaking of the Bills of Sale Ordinance, 1950, I cannot do better, in stating its application, than to echo the Lord Chancellor, who said at page 462:—

"The Bills of Sale Act relates to assurances, assignments or rights to seize given or conferred by the person who owns the property."

The only question for determination in *McEntire's* case *supra* was, did the property in the engine pass at any time from Crossley Brothers to the bankrupt? The same question is posed in paragraph 5 of the statement of defence, which says that the true relationship between the parties is that of seller and purchaser and not that of owner and hirer. In considering this question, Lord Herschell L.C. at page 462 said:—

"....I quite concede that the agreement must be regarded as a whole — its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is."

I pause to observe that the defendant in the present case did not rely on the agreements to prove her claim that the property in the goods had passed to her. Instead, as clearly indicated in paragraph 6 of the statement of defence, she relies on what she calls an admission by the plaintiff in paragraph 4 of the statement of claim to the effect that she was the purchaser of the goods. Apart from saying that no such admission can be implied, I do think this is a novel way of discharging a burden of proof. The defence counsel had further submitted that the evidence of the credit note (D.51), which was given by the plaintiff to the defendant for the return of two Fridgette Refrigerators, was proof of the fact that the property in the goods had passed to the defendant. With due respect to counsel, I cannot see how I can accept this as a correct proposition of the law of evidence. The question whether the property should or should not pass to the purchaser of goods depends on the intention of the parties to the agreement. Such an intention can only be ascertained from the agreement itself and not from any transaction which may have occurred subsequent to the execution of the agreement which may, in certain circumstances, assist in proving the existence of a new agreement. However, Lord Herschell in *McEntire's* case *supra* seemed to have this in mind when he said at page 463:—

"But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties had used. It is only by a study of the whole of the language that the substance can be ascertained."

Following this view, it seems inevitable that the defence raised in the present case stands or falls by the proper construction of the terms in the hire purchase agreements. Clause 6 of each of these agreements is clear in terms that the intention of the parties was that the property in the goods should not pass to the defendant. That being the case, the defendant cannot be the legal owner of the goods and was in no position, therefore, to convey and assign any right to the plaintiff to seize the goods.

It is perhaps necessary to mention briefly the evidence relating to the credit note. It seems that some time in November, 1962 — that was about three months after the 1962 agreements were signed — the plaintiff, at the request of the defendant, agreed to take back 2 Fridgette Refrigerators. These refrigerators had formed part of the goods supplied under hire purchase agreement No. 655 for the year 1960 and included in the hire purchase agreement No. 181 for the year 1962. Upon retaking the goods the plaintiff issued in favour of the defendant a credit note for $180 which amount was accounted for as payment made towards the total amount due from the defendant to the plaintiff. These goods, however, were not deleted from the relevant agreement and were notionally regarded by the plaintiff company as goods which were still in the possession of the defendant for which rents were charged along with the others. Although this particular transaction cannot be relied upon by the defendant as evidence of the intention of the parties with regard to the transfer of the property in the goods, it must have the effect of reducing the amount claimed by the plaintiff as these 2 refrigerators were, in fact, no longer in the possession of the defendant.

Accordingly, judgment with costs was entered for the plaintiff in terms that the amount of the arrears of rents claimed are reduced after taking into account the return of the 2 refrigerators. In the same way, the order of possession was subject to the 2 refrigerators being excluded therefrom.

From this judgment the defendant appealed to the Federal Court.

FEDERAL COURT.

P. P. Dharmananda for the appellant.

Yeoh Kian Teik for the respondents.

Barakbah C.J. (Malaya) (delivering oral judgment): This is an appeal from a judgment of Mr. Justice Ali Hassan whereby judgment was entered for the plaintiffs, the present respondents, for arrears of instalment payments in

respect of the delivery of goods under the agreements of hire-purchase. I need not go into the facts of the case as they are fully set out in the judgment of the learned trial Judge.

The only question this Court has to decide is whether the property passes to the hirer under the 1960 agreement entered into between the parties. Clause 5 of the said agreement gives the hirer the option to terminate it which satisfies the test laid down in the case of *Helby* v. *Matthews*.[4] In my view the Court must look into all the surrounding circumstances to ascertain the real intention of the parties (see *Polsky* v. *S. & A. Services Ltd.*[5]). In my opinion this is what the trial Judge did. We also look into the surrounding circumstances and see nothing to detract from the face value of the 1962 agreement.

The appellant in this case speaks English and it is clear from what she herself said that she fully appreciated the nature of the agreement. According to her in her evidence she said:—

"Yes, plaintiff could have taken possession of the articles if they wanted. I was and am fully aware of this. Yes, I made several requests to Chong Phor not to take such action because of my business."

Once it has been established that it was a hire-purchase agreement it was open to the parties to modify the agreement in any way they see fit and this is the purpose of the 1962 agreement.

In any event the 1962 agreement was not a bill of sale as at the time of the agreement property was all the time vested in the respondents.

I would add that section 20 of the Sale of Goods Ordinance has nothing whatever to do with this case because it only applies to unconditional contract for the sale of goods and neither the 1960 nor the 1962 agreements were unconditional contracts for the sale of goods.

In the circumstances I would dismiss the appeal with costs.

Thomson L.P. (delivering oral judgment): I agree with what my Lord has said.

I have been unable to discover anything in the agreements themselves *in gremio* or in the surrounding circumstances to suggest that at any time the property in the items concerned passed from the respondents. In the circumstances there can be no question of any concealed bill of sale or anything of the sort and the parties were at perfect liberty to modify their original arrangements as they saw fit.

I can see no reason why this Court should interfere in any way.

The appeal should be dismissed with costs.

Tan Ah Tah J.: I concur.

Appeal dismissed.

Solicitors: *Dharmananda & Co.*; *Gibb & Co.*

WILLIAM JACKS & CO. (MALAYA) LTD. v. CHAN & YONG TRADING CO.

[O.C.J. (Gill J.) December 7, 1963]

[K.L. — Civil Suit No. 706 of 1862]

Partnership—Person holding out as partner—Liability of partners—Partner using goods for personal use—Minor partner—Whether Partnership liable—Whether minor partner liable if he does not repudiate on attaining majority.

Contracts (Malay States) Ordinance, 1950, ss. 137, 198, 199, 200, 201 and 217—Effect of provisions.

The plaintiffs claimed against the defendants the sum of $12,734.91 for goods sold and delivered by the plaintiffs to the defendants. The writ was served on Chan and Yong the partners of the defendant firm.. Yong did not take any steps to defend but Chan denied the plaintiffs' claim on the following grounds namely that (a) no firm by the name of Chan & Yong Trading Co. ever existed and that if such a company did exist he was not a partner thereof (b) he had not in any way represented or held himself out as partner of the said firm (c) the goods bought from the plaintiffs were for the personal use of Yong who was a minor and that therefore the partners were not liable.

Held: (1) Chan was a partner of "Chan & Yong Trading" and "Chan & Yong Construction" and on the evidence "Chan & Yong Trading Company" and "Chan & Yong Trading" were one and the same firm because there was no evidence that there were two separate firms by these two separate names;

(2) Chan represented himself to be a partner in the firm by approaching a salesman of the plaintiffs to ask for credit facilities with the plaintiff company, by registering the partnership with the Registrar of Businesses and by opening a banking account with his own money in the name of the partnership with the Bangkok Bank. Each mode of representation was sufficient to fix him with liability as a partner of the firm;

(3) the fact that Yong made use of the goods bought from the plaintiffs for his own purpose did not mean that the partnership and consequently the partners were not liable. Further as Yong had not taken any steps after attaining the age of majority to repudiate the partnership he was also liable as a partner of the firm.

Cases referred to:—

(1) *Bond* v. *Gibson and Jephson* (1808) 1 Camp. 184; 170 E.R. 923.

(2) *Bishop* v. *Tudor Estates* [1952] C.P.L. 807.

(3) *Gopi Mal Durga Das* v. *Jain Bank of India Ltd. Lahore* A.I.R. 1918 Lahore 269.

(4) *Parkash Chand* v. *Strauss & Co. Ltd. Karachi* A.I.R. 1928 Lahore 854.

CIVIL SUIT.

L. P. Thean for the plaintiffs.

M. J. Mathew for the defendants.

Cur. Adv. Vult.

Gill J.: This is a claim for $12,734.91 for goods sold and delivered by the plaintiff company to the defendant firm. The writ was served on two persons named Chan Yin Tee and Yong Yit Chong, both of whom are alleged to be the partners of the defendant firm. Yong Yit Chong has not taken any steps to defend the action, and indeed has given evidence in support of the plaintiffs' claim, but Chan Yin Tee denies the plaintiffs' claim upon a number of grounds.